

Further during the course of counsel's submissions in the present case before me, I was referred to the judgment of Datuk Mohamed Zahir J. in *Devanai v. Chinniah & Ors.*⁽⁴⁾ Lest I might be misunderstood to have taken a different view from that of the learned judge, I should explain that case as follows. The plaintiff was the proprietress of a sawmill business named Kapur Sawmill. The sawmill licence for this business was issued in the name of the business. Later she sold the business to the defendant No. (1), who subsequently formed a partnership with the other two defendants and some other persons to run the sawmill business. Although the plaintiff had completely divested herself of this business, the defendant No. (1) had not yet fully paid the plaintiff the sale price of the business. Consequently the plaintiff sued for the rescission of the sale agreement and for a declaration that she was still the owner of the business. She also claimed the balance of the sale price of the business. The learned judge dismissed her claim for rescission and declaration, but allowed the claim for the balance of the sale price. The learned judge refused to allow claim for rescission and declaration, because in his judgment the sale agreement transferring the business from the plaintiff to the defendant No. (1) and the partnership agreement transferring it further from this defendant to the partnership were both illegal contracts. They were illegal because the transfers must necessarily include dealings with the requisite sawmill licence, and as the licence was not transferable such dealings were contrary to the provisions of rule 20 of the Trengganu Forest Rules, 1356. Hence the contracts were illegal. It is observed that despite the illegality of the sale agreement, the plaintiff was held to be entitled to the balance of the sale price of the business. The learned judge gave no reason for allowing the plaintiff to recover the balance of the sale price, but in my view her entitlement could be justified on the ground that the transfer of business to the defendant No. (1), even though under the illegal sale contract, was effective as this transfer did not depend upon, but was independent of, the transferability of sawmill licence. Hence the case came within the principle established in *Bowmakers Ltd. v. Barnett Investment Ltd.*, *supra* and *Sajan Singh v. Sardara Ali*, *supra*.

Now reverting to the present case, I hold that although the previous two agreements were illegal, the incorporation of the company was a perfectly lawful exercise as the company was not the creature of these two agreements but created by the statutory acts of the Registrar of the Companies under section 16 of the Companies Act. Whilst its operation to run the sawmill was illegal as it had no sawmill licence to cover such operation, the sale of shares and the guarantee agreement for the purpose of making the company's operations come within the ambit of legality were not illegal. Hence there should be a judgment entered for the plaintiff in the sum of \$43,000 and costs.

Claim allowed.

Solicitors: Gurbakhash Singh & Co.; S.E. Rajah & Co.

PUBLIC PROSECUTOR v. DATUK HAJI DZULKIFLI

[O.Cr.J. (Tan Chiaw Thong J.) September 14, 1981]

[Kota Kinabalu — Criminal Trial No. 2 of 1979]

Criminal Law and Procedure — Altered charge — Whether fresh consent of Public Prosecutor necessary — Prosecution by Deputy Public Prosecutor — Implied consent — Criminal Procedure Code, ss. 3 & 158 — Emergency (Essential Powers) Ordinance, 1970, s. 9.

Jurisdiction — Whether court could alter charge — Criminal Procedure Code, s. 158.

Learned counsel for the accused had submitted that, because the court at the end of the case for the prosecution altered the charge against the accused, a fresh consent of the Public Prosecutor was necessary before the accused was asked to plead to the altered charge.

The altered charge amended the original charge in 2 respects, namely:— (a) by substituting for the word "approval" the word "concurrence" in relation to the act alleged to have been done by the accused for his pecuniary advantage; and (b) by deleting items (8) and (9) of the particulars relating to the pecuniary advantage alleged against the accused.

The following points were made before the court:— (1) whether the court had jurisdiction to alter the charge against the accused; (2) whether a prosecution under an altered charge within Ordinance 22 of 1970 should be proceeded with is a matter within the jurisdiction of the Public Prosecutor to decide; and (3) the charge was not amended, but altered, in that the word "approval" was altered to the word "concurrence."

Held: (1) the consent is in respect of the prosecution of the accused for an offence of corrupt practice under section 2(1) of Ordinance 22 of 1970. The altered charge against the accused relates to the same offence and not a different one. The alterations made related to particularizations in the original charge only, and do not have the effect of charging the accused with a different offence. Hence, provided the court may properly alter the original charge in the manner it has done, the altered charge falls within the ambit of the consent of the Public Prosecutor;

(2) even if a fresh consent of the Public Prosecutor is necessary to prosecute the accused on the altered charge, the prosecution of the accused by a Deputy Public Prosecutor in this court from the outset constitutes such a consent. The second and third points raised by the learned counsel for the accused were therefore rejected;

(3) as regards the first point, the alteration to the original charge was made under section 158 which clearly empowers and authorizes the court to do. It is therefore within the jurisdiction of the court to do so;

(4) a fresh consent of the Public Prosecutor is therefore unnecessary before the accused is called upon to plead to the altered charge and to be further tried thereon.

Cases referred to:—

- (1) *Abdul Hamid v. Public Prosecutor* [1956] M.L.J. 231.
- (2) *Perumal v. Public Prosecutor* [1970] 2 M.L.J. 265, 266.
- (3) *Haji Abdul Ghani & Anor. v. Public Prosecutor* [1981] 2 M.L.J. 230.
- (4) *Public Prosecutor v. Lee Chwee Kiok* [1979] 1 M.L.J. 45.

CRIMINAL TRIAL.

Abdul Khalid bin Abdul Manaf (Deputy Public Prosecutor) for the Public Prosecutor.

Dominic Puthucheary (*Abdul Razak Rouse* with him) for the accused.

[Editorial Note: See also *Public Prosecutor v. Mohamed Halipah* [1982] 1 M.L.J. 155.]

Tan Chiaw Thong J.: Learned counsel for the accused has submitted that, because the court at the end of the case for the prosecution altered the charge against the accused, a fresh consent of the Public Prosecutor was necessary before the accused was asked to plead to the altered charge.

The altered charge amended the original charge in two respects, namely:—

- (a) by substituting for the word "approval" the word "concurrence" in relation to the act alleged to have been done by the accused for his pecuniary advantage; and
- (b) by deleting items (8) and (9) of the particulars relating to the pecuniary advantage alleged against the accused.

Learned counsel for the accused raised three points:—

- (1) Whether the court has jurisdiction to alter the charge against the accused;
- (2) Whether a prosecution under an altered charge within Ordinance 22 of 1970 should be proceeded with is a matter within the jurisdiction of the Public Prosecutor to decide; and
- (3) The charge was not amended, but altered, in that the word "approval" was altered to the word "concurrence".

In view of this, the consent of the Public Prosecutor must be obtained for the prosecution of the accused on the altered charge.

The existing consent is in the following terms:—

**"EMERGENCY (ESSENTIAL POWERS) ORDINANCE
No. 22/1970 CONSENT UNDER SECTION 9(1)**

In exercise of the powers conferred upon the Public Prosecutor under section 9(1) of the Emergency (Essential Powers) Ordinance No. 22/1970 and vested in me by virtue of section 376(i) of the Criminal Procedure Code, I, Datuk Sri Haji Hamzah bin Haji Abu Samah, Public Prosecutor, hereby consent to the prosecution of one Datuk Haji Dzulkifli bin Datuk Haji Abdul Hamid, NRIC No. H0000014 of No. 10, Jalan Sembilan Baru, Kota Kinabalu, Sabah, for an offence under section 2(1) of the said Ordinance alleged to have been committed by him on 14th January, 1976 at the Ministry of Finance, Kota Kinabalu, Sabah.

Dated this 25th of January, 1979.

(Signed)
DATUK SRI HAJI HAMZAH BIN HAJI ABU SAMAH
Public Prosecutor,
Malaysia."

Learned counsel for the accused has referred to the provisions of section 9 of Ordinance No. 22 of 1970 which relates to the requirement of the consent of the Public Prosecutor for a prosecution under that Ordinance, and to sections 3 and 158 of the Criminal Procedure Code in support of his submission.

Section 3 of the Criminal Procedure Code provides as follows: "All offences under the Penal Code shall be inquired into and tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into and tried according to the same provisions: *subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences*" (emphasis added). It is submitted that Ordinance

- A** No. 22 of 1970 is such a written law within the meaning of this section and since section 9 thereof requires the prior consent of the Public Prosecutor for a prosecution under that Ordinance, charging the accused with an altered charge would be "a prosecution" within the meaning of that section, and hence, before the accused was asked to plead thereto, a fresh consent of the Public Prosecutor would have been necessary. In this connection, attention is drawn to the distinction between a "sanction" and a "consent" as laid down in the case of *Abdul Hamid v. Public Prosecutor*.⁽¹⁾
- B**

- Learned counsel for the accused has stressed the use of the words "trying such offences" in the context in which they appear in section 3 of the Criminal Procedure Code, to emphasize the need for a fresh consent. In my view, the words emphasized above in that section clearly relates to matters of procedure, and the consideration is whether section 9 of Ordinance 22 of 1970 requires that a fresh consent from the Public Prosecutor is necessary for the accused to plead and be further tried upon the amended charge. The wording of section 9 of Ordinance 22 of 1970 is identical to that of section 26 of the Prevention of Corruption Act, 1961. It was held, *inter alia*, in the case of *Perumal v. Public Prosecutor*⁽²⁾ that a prosecution under the 1961 Act is instituted when the accused is called upon to plead to the charge. If, upon considering section 9 of Ordinance 22 of 1970, the answer is in the affirmative, then section 3 of the Criminal Procedure Code carries the matter no further. Likewise, in my view, if the answer is in the negative.
- C**
- D**
- E**

- Having regard to the respective wordings of the consent of the Public Prosecutor and the original and altered charges against the accused, I am of the view, and hold, that the second and third points made by learned counsel for the accused cannot be accepted. The consent is in respect of the prosecution of the accused for an offence of corrupt practice under section 2(1) of Ordinance 22 of 1970. The altered charge against the accused relates to the same offence and not a different one. The alterations made related to particularizations in the original charge only, and do not have the effect of charging the accused with a different offence, as is obvious from the alterations mentioned at the beginning of this ruling. Hence, in my judgment, provided the court may properly alter the original charge in the manner it has done, the altered charge falls within the ambit of the consent of the Public Prosecutor. In the case of *Haji Abdul Ghani bin Ishak and Mohd. Nor bin Baha v. Public Prosecutor*,⁽³⁾ the learned trial judge at the end of the case for the prosecution amended the particulars in the charge against the 1st appellant laid under the same section of the same Ordinance as the charge against the accused here. The Federal Court (at page 12 of the appeal judgment) said: "In our view it is clear in the amended charge that there is only one offence of committing corrupt practice and that the rest of the charge merely deals with particularizations." Likewise, in my judgment, the case here. In this connection, section 161 of the Criminal Procedure Code may also be referred to. It would, of course be different if the altered charge is for an
- F**
- G**
- H**
- I**

offence different from that in the original charge, under the same or different section of the Ordinance, which is not the case here, see e.g. *Public Prosecutor v. Lee Chwee Kiok*,⁽⁴⁾ the headnotes of which reads as follows:

"The accused was originally charged with trafficking in dangerous drugs on July 21, 1976 at TBG 1306 Jalan Harper, Kelang under section 39B(1)(a) of the Dangerous Drugs Ordinance. On November 25, 1976 the Public Prosecutor issued his written consent to prosecute under section 39B(3) of the said Ordinance. At the trial, on September 19, 1977, the learned Deputy Public Prosecutor amended the charge in two respects: The offence was alleged to have been committed at TBG 1306A, Jalan Harper, Kelang and the offence alleged was that of doing an act preparatory to trafficking under section 39B(1)(c) of the Dangerous Drugs Ordinance. No consent of the Public Prosecutor had been obtained on the amended charge.

Held, acquitting and discharging the accused: (1) the trial was a nullity as the Public Prosecutor had not given his consent on the amended charge;

(2) the facts as found in this case did not support either charge."

Even if a fresh consent of the Public Prosecutor is necessary to prosecute the accused on the altered charge, I consider that, on the authority of *Perumal v. Public Prosecutor*, *supra*, the prosecution of the accused by a Deputy Public Prosecutor in this court from the outset constitutes such a consent. In *Perumal's* case, one of the questions of law reserved for the decision of the Federal Court was: "(3) If no adequate consent is available and no Deputy Public Prosecutor is present at the time when an accused person is required to plead to an offence under the Prevention of Corruption Act and/or a prescribed offence, would the presence of the Deputy Public Prosecutor as prosecutor at the hearing of the said charges against the accused on a subsequent date be deemed to be sufficient consent for institution of prosecution with the meaning of section 26?" As earlier observed, the terms of section 26 of the 1961 Act are identical to those in section 9 of Ordinance 22 of 1970. In its judgment (at page 268, letters E to H, right-hand column), the Federal Court said:

"...where the Public Prosecutor or his deputy prosecutes from the inception under the provisions of the Act there is necessarily an implied consent to the prosecution, but where he does not do so and yet the accused is called upon to plead, consent by the Public Prosecutor given subsequently does not validate the institution of the prosecution unless the court is satisfied that he or a colleague has in fact given consent prior to the moment of plea.

Section 26 does not say that the consent must be in writing. So it may be in writing or oral. Indeed in *Public Prosecutor v. Oie Hee Koi*⁽⁵⁾ and associated appeals Lord Hodson giving the advice of the Privy Council said that the Public Prosecutor's consent is implicit if he is himself the prosecutor. Lord Hodson said at page 154:

"It was further argued that under section 80 of the (Internal Security) Act the consent of the Public Prosecutor to the prosecution should have been and was not obtained. The answer to this objection is that the Public Prosecutor was himself the prosecutor and his consent is implicit in his action. The provision in section 80 requiring consent is applicable where prosecutions take place... and the Public Prosecutor is not the actual prosecutor."

The second and third points raised by learned counsel for the accused are therefore rejected.

As to the first point, Ordinance 22 of 1970 lays down no provision relating to alteration of charges. Such a matter therefore falls to be governed by the

A relevant provisions of the Criminal Procedure Code, that is, those contained in sections 158 to 163 of the Criminal Procedure Code. The alteration to the original charge was made under section 158, and in the circumstances, that section clearly empowers and authorises the court to do so, and I hold that it is within the jurisdiction of the court to do so. Hence, B I find that there is no merit in this point. I have also considered the article entitled "The Power to Prosecute" by Professor Ganville Williams (1955) Criminal Law Review pages 596, 668.

For the reasons given, therefore, I rule that a fresh consent of the Public Prosecutor is unnecessary before the accused is called upon to plead to the altered charge and to be further tried thereon.

Ruled accordingly.

Solicitors: *Rayner & Co.*

D **ABDULLAH BIN MAMAT & ANOR. v.
PENGARAH HUTAN NEGERI TRENGGANU
& ANOR.**

[O.C.J. (Salleh Abas F.J.) August 25 & September 14, 1981]
[Kuala Trengganu — Civil Suit No. 46 of 1980]

E *Forestry — Licences to collect and cut timber — Application for licence approved — Expenses incurred for fees and in clearing area — Approval subsequently revoked — Claim for damages — Equitable estoppel.*

Equity — Equitable estoppel — Application for logging licence — Approval subsequently revoked — Claim for expenses incurred.

F The plaintiffs had applied for a logging licence to cut the timber on state land. The application was approved and the plaintiffs paid the fees and also spent money to clear the boundaries of the approved area. Subsequently the approval was revoked. The plaintiffs claimed the sum of \$21,700.00 which they had expended as a result of the approval and a further sum of \$150,000.00 being the estimate of loss of profit which they would have gained but for the cancellation of the approval.

G **Held:** (1) the licence required for the collection and removal of timber is a requirement of the law and not really a matter of free choice by both parties as a contract is. The application for the licence and its approval could not be held to have created contractual rights and obligations between the applicant and the licensing authority;

H (2) where an applicant for a licence had expended money on the strength of a letter conveying approval of his application for a licence, the licensing authority is not free to refuse to issue the licence or to terminate the approval without compensating the loss incurred by the applicant;

(3) the plaintiffs were therefore entitled to recover the sum of \$21,700.00 which they had expended because of the approval;

(4) there was no basis either in fact or law for their claim for loss of profit, since there was no evidence that they lost any profit and also since the case was not one of breach of contract.

I *Case referred to:-*

(1) *Mok Deng Chee v. Yap See Hoi & Ors.* [1981] 2 M.L.J. 321.

CIVIL SUIT.

Wan Muttalib for the plaintiff.

Haji Abdul Kadir Sulaiman, Legal Adviser, for the defendant.